

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOSE FRANCISCO GARCIA,

Plaintiff,

v.

LEWIS NEHEMIAH, et al.,

Defendants.

NO: 12-CV-3104-TOR

ORDER DENYING DEFAULT  
JUDGMENT AND NOTING  
PLAINTIFF'S JURY DEMAND

**BEFORE THE COURT** is Plaintiff's Motion for Default Judgment dated December 17, 2012. ECF No. 32. Additionally before the Court is Plaintiff's Motion for Jury Demand dated December 28, 2012. ECF No. 34. The Court has considered both motions without oral argument and is fully informed.

**MOTION FOR DEFAULT**

The Court entered an Order dated October 16, 2012, directing service of the Complaint on the above named Defendants. ECF No. 17. The waiver of service and United States Marshal Service Process Receipt and Return all show that the

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JURY DEMAND -- 1

1 Defendants accepted service by mail and therefore were entitled to 60-days within  
2 which to answer or otherwise plead to the Complaint. See ECF Nos. 24, 25, 26,  
3 27, 28 and 29. Defendants filed their Answer within that 60-day period, on  
4 December 17, 2012. ECF No. 31. Accordingly, Plaintiff's motion for default  
5 judgment is unsupported by the record and denied as moot.

#### 6 DEMAND FOR JURY TRIAL

7 Pursuant to F. R. Civ. P. 38, a party may demand a jury trial on all issues so  
8 triable – “no later than 14 days after the last pleading directed to the issue is  
9 served.” Rule 38(b). A written demand served on the opposing parties is  
10 required, not a motion. *Id.* This right is waived if a party fails to properly serve  
11 and file its demand for a jury trial. Fed. R. Civ. P. 38(d).

12 In this case, a written demand has clearly been made within 14 days after the  
13 last pleading directed to the issue, that being within 14 days after the answer was  
14 filed on December 17, 2012. See ECF No. 35 showing the mailing of ECF No. 34  
15 on December 28, 2012; see *Lutz v. Glendale Union High School*, 403 F.3d 1061,  
16 1063 (9th Cir. 2005) (recognizing plaintiff had 10 days after she was served with  
17 defendant's answer to demand a jury trial). The 2009 amendment to Rule 38 now  
18 allows 14 days within which to file a written demand. Under the “prison mailbox  
19 rule” of *Houston v. Lack*, 487 U.S. 266 (1988), a document may be construed as  
20 filed on the date it was submitted to prison authorities for mailing. Irrespective of  
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1 when Plaintiff's jury demand was delivered to prison authorities, it bears a timely  
2 postmark of December 28, 2012.

3 However, the record does not show whether Plaintiff served the Defendants  
4 as Rule 38 requires. By Order dated October 16, 2012, this Court cautioned  
5 Plaintiff that he was required to serve Defendants' attorney with every pleading  
6 and was required to file a certificate of service stating that he mailed a copy of  
7 every pleading to Defendants' attorney.

8 Plaintiff shall serve upon Defendants, or if appearance has been  
9 entered by counsel, upon their attorney, a copy of every further  
10 pleading or other document submitted for consideration by the Court.  
11 He shall include, with the original paper to be filed with the District  
12 Court Executive, a certificate stating the date a true and correct copy  
of any document was mailed to the Defendants or to their counsel.  
Any paper received by a District Judge or Magistrate Judge which has  
not been filed with the District Court Executive or which fails to  
include a certificate of service will be disregarded by the Court.

13 Order Directing Service, ECF No. 17 at 5. Accordingly, absent a certificate of  
14 service showing Plaintiff served Defendants' attorney, his jury demand will be  
15 disregarded by the Court.

16 **IT IS HEREBY ORDERED:**

17 1. Plaintiff's Motion for Default Judgment, ECF No. 32, is **DENIED** as  
18 moot.

19 2. Plaintiff's Motion for Jury Demand, ECF No. 34, is **DENIED as**

20 **unnecessary to invoke his jury trial right** but is noted for the record.  
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JURY DEMAND -- 3

1 Absent prompt submission of proof of service upon Defendants, the  
2 Court will disregard Plaintiff's jury demand.

3 The District Court Executive is directed to enter this Order and forward  
4 copies to the parties.

5 **DATED** this 15<sup>th</sup> day of January, 2013.

6 *s/ Thomas O. Rice*  
7 THOMAS O. RICE  
8 United States District Judge  
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